

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOVEMBER 21, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1913

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DEREK D. B.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Outagamie County:
DENNIS C. LUEBKE, Judge. *Affirmed.*

LaROCQUE, J. Derek D. B. appeals an order waiving juvenile court jurisdiction over prosecution of conspiracy to commit first-degree intentional homicide and conspiracy to hide a corpse. Derek suggests the juvenile court erred in the following respects: (1) finding prosecutive merit to support a penalty enhancer because the crimes were part of a "pattern of criminal gang activity"; (2) finding prosecutive merit on the basis of "plausible" rather than "reliable" evidence; (3) refusing to allow further discovery of exculpatory statements made by Derek, to attack the credibility of the police informant as well as the reliability of the juvenile intake worker's waiver recommendation; and (4) finding sufficient evidence to support the waiver. This court rejects Derek's challenges and affirms the waiver order.

Derek first contests the sufficiency of the evidence to support the penalty enhancer, that is, whether each of the crimes was committed for the benefit of a criminal gang, subjecting the actor to increased penalties pursuant to § 939.625, STATS. This court concludes that a finding of prosecutive merit is unnecessary with respect to penalty enhancers. Section 48.18(5), STATS., requires only that the court determine whether "the matter" has prosecutive merit. Charges of conspiracy to commit murder and hide a corpse were the essential matters before the court. The enhancer relates solely to the penalty to be imposed upon conviction for the principal crimes. Further, § 48.18(9), STATS., provides that if waiver is granted, the district attorney has the authority to charge the offense he or she deems appropriate, and the waiver statute does not restrict the authority of any court or jury to convict the child in regard to any offense. Thus, the State need not have included the gang enhancement provision in the delinquency petition, and the juvenile court need not find prosecutive merit as respects that issue prior to a waiver decision.

Derek next contests the juvenile court's determination that the evidence to support prosecutive merit was "plausible" without a determination that the evidence was "reliable." In order to address Derek's contention, the factual allegations relating to prosecutive merit are set forth in some detail. According to the delinquency petition, an Appleton police detective, Daniel Woodkey, conducted an investigation into the death of Germaine Gray, who was found dead near a farm field in Langlade County on May 12, 1995. Informants told the detective that a gang called the "D-Mac Crew" had planned to kill Gray and then burn and hide his body. Woodkey interviewed Derek. Derek admitted that he was "D-Mac" and the leader or "Chief" of a group called "D-Mac Crew." He identified other members by name, nickname and rank. He told Woodkey of the various incidents that led to the gang's plans to kill Gray, and Derek stated to the other gang members at a meeting: "One of these days, he's going to die." He indicated that the members agreed to kill Gray, each member swearing to the idea by "putting 'his G' on the agreement." Derek reported that he was present when three gang members went to pick up the victim and returned with him, one of whom reportedly stated that they had: "Jazz [Gray] in the car and it was all set." Derek admitted to hearing the remark from the trio that they were going to take him up to a cottage and "do the shit tonight." Derek told them: "Alright man." Derek, who was not present either at the murder or the hiding of the corpse, told Woodkey that the three returned and described the actual murder in brutal detail. He indicated that "we decided that we have to ... go up there again and bury [the body]." He advised

Woodkey that this idea was a group decision. He then described in detail the methods and circumstances of the gang's burning and hiding of Gray's body.

The petition also alleges that another detective interviewed Jonathan Kinney, who indicated he was a member of the "D-Mac Crew." Kinney described the relevant events much the same as Derek described them. Kinney explained that Derek was the leader of the group; that the victim, Gray, owed Derek \$250, and had been causing the group other problems as well; that the Crew had a meeting at Derek's residence and agreed to kill Gray. Kinney advised that "Derek approved the idea as the leader and Derek had everyone vote on the idea." Derek then stated: "Alright, it's over and done with, now it has to be done." Kinney said Derek and the others assaulted him when he indicated he didn't want to go through with the plan. Kinney said he was present with Derek and others just before some of the group took Gray to Langlade County to kill him. After the homicide, Kinney advised that those responsible returned and described the killing in detail, and that Derek told Kinney that he "should not say anything or (Kinney would) be dead." Derek told the group: We have to get rid of [the body], get it destroyed, or we'll get busted." He corroborated Derek's description of the burning and hiding of Gray's body.

Derek's parents filed affidavits contradicting the alleged admissions attributed to Derek. They were present during the police interrogation, and allege that reports of Derek's admissions described above were false and untrue in a number of specific relevant respects. One of the virtually identical affidavits is appended in lieu of summary. In reference to Kinney's allegations, Derek's attorney asserted in an affidavit that Appleton police officers testified in Kinney's juvenile waiver hearing that Kinney had lied to them on three occasions in the course of his statements to the police. He also established that Kinney had received consideration from the prosecution and law enforcement for his cooperation.

By agreement, the juvenile court accepted the affidavits in lieu of testimony and also permitted defense counsel to examine the officers under oath at the waiver hearing. One officer confirmed that Derek made the statements attributed to him in the petition, and another explained that Kinney's untruths were unrelated to the statements Kinney attributed to Derek. At the conclusion of the evidence, the juvenile court decided that the State's allegations

against Derek were "plausible" and thereby found prosecutive merit to the charges of conspiracy to commit homicide and hide the corpse.

At the conclusion of the hearing, the juvenile court stated:

[W]e simply have one or two or more individuals who are saying different things, things which may in many instances may be diametrically opposed. That fact in and of itself does not affect the reliability for admissibility purposes of either.

What the Court really then has to do is decide the matter of plausibility, whether ... the statements relied upon by the state in the petitions are so implausible that the Court should give them no credence whatsoever.

Derek relies upon *In re J.G.*, 119 Wis.2d 748, 350 N.W.2d 668 (1984), to support his contention that a plausibility finding is inadequate. *J.G.* holds that where the confession is the principal basis for asserting prosecutive merit, and the juvenile establishes by a specific allegation a grounds for declaring the confession unreliable, he must then come forward with some evidence. The state then has the burden of showing by a preponderance of the evidence that the confession is reliable. *Id.* at 762, 350 N.W.2d at 676.¹ Contrary to Derek's contention on appeal, the supreme court declined to define "reliability"; the court merely indicated the definition assigned by the court of appeals.

It is apparent that the juvenile court's reference to plausibility is attributable to the well-settled law that the magistrate at a preliminary hearing is to be concerned not with matters of credibility, but only with "plausibility."

¹ Although *In re J.G.*, 119 Wis.2d 748, 350 N.W.2d 668 (1984), characterized the juvenile's statement as a "confession," and this court characterizes Derek's statements as "admissions against interest," the nature of the process for examining prosecutive merit where the statement is the principal basis for that determination should be no different. Further, there is often no bright line between a statement that by itself virtually proves the entire case for conviction and admissions that require some additional evidence to establish a conviction. Among other factors, there is no allegation that Derek was present at either the murder or the concealment of the victim's corpse, and his statements probably fall into the category of admissions.

State v. Dunn, 121 Wis.2d 389, 398, 359 N.W.2d 151, 154 (1984). Thus, although a judge at a preliminary hearing must ascertain the plausibility of a witness' story, and whether, if believed, it would support a bindover, the court cannot delve into the credibility of a witness. *Id.* at 397, 359 N.W.2d at 154. The issue of credence or credibility is a matter properly left to the trier of fact at trial. The line between plausibility and credibility may be fine, and the distinction is one of degree. *Id.* at 397, 359 N.W.2d at 155. The juvenile court in this case tacitly concluded that the case law also establishes that the degree of proof invoked in deciding prosecutive merit at a waiver hearing is analogous to that of a preliminary hearing.

This court need not decide whether *J.G.* alters the degree of prosecutive merit necessary where the principal evidence is a challenged confession or admission. That issue need not be resolved here because established case law, including a companion case decided the same day as *J.G.*, holds that the degree of proof generally is that applicable at a preliminary hearing. See *In re P.A.K.*, 119 Wis.2d 871, 350 N.W.2d 677 (1984). *P.A.K.* reaffirmed the degree of proof to establish prosecutive merit:

The state contends ... that the fact that the degree of probable cause required to establish prosecutive merit is the same as the degree of probable cause required to bind over an adult after a preliminary examination does not mean that the procedures used at a waiver hearing must be the same as the procedure typically used at a preliminary examination. In other words, the state argues that simply because the *degree* of prosecutive merit required is the same does not mean that the *manner* in which prosecutive merit is established must be the same. We agree. (Emphasis in original.)

Id. at 884, 350 N.W.2d at 684. Because the juvenile court found prosecutive merit when it found Kinney's allegations plausible, the reliability of the admissions attributed to Derek need not be resolved.

Derek, however, raises an additional issue with respect to the court's reliance upon Kinney's accusations. Citing *In re T.M.J.*, 110 Wis.2d 7, 327 N.W.2d 198 (Ct. App. 1982), Derek argues that the reliability of a citizen witness

or informant is tested by establishing: (1) the underlying circumstances that show reason to believe the informant is credible, and (2) the underlying circumstances that show that the manner in which the informant reached his conclusions was reliable. *Id.* at 16-17, 327 N.W.2d at 203 (citing *Aguilar v. Texas*, 378 U.S. 108 (1964)). It should first be noted that the two-prong test of *Aguilar* to which *T.M.J.* refers has since been replaced with a broader "totality of the circumstances" test. *See Illinois v. Gates*, 462 U.S. 213 (1983). Under the latter test, the magistrate makes a practical common-sense decision whether, given all the circumstances before him, including the credibility of the informer and the basis of his knowledge, there is probable cause. *Id.* at 230-31.

The underlying circumstances of Kinney's knowledge were his presence and participation in the events to which he referred. Further, as the juvenile court noted, Kinney's statements were made as part of a series of admissions against his own interest. Further, while Derek's parents' affidavits attack the accuracy of many of the statements attributed to Derek, the remaining statements, which are not challenged, tend to corroborate Kinney's statements. For example, Derek confirms that the conversations took place in Kinney's presence. The parents did not challenge Derek's statement confirming that someone punched Kinney in the face for his reluctance to participate. These and other remaining admissions also tend to support the finding that Kinney's allegations were worthy of belief. Finally, defense counsel was given a full opportunity to examine the detective who took Kinney's statement and to explore the basis of the untruths connected with Kinney's statements. As noted earlier, those untruths were unrelated to the statements Kinney attributed to Derek. The juvenile court therefore did not err by using Kinney's statements as a basis to find prosecutive merit.

This court also rejects Derek's challenge to the court's rulings on discovery. Discovery prior to the prosecutive merit portion of the waiver hearing is restricted as set forth in *T.M.J.*, 110 Wis.2d at 13, 327 N.W.2d at 202. Derek does not contend there was a violation of those standards. Derek asserts a denial of due process based upon an absence of further discovery. He argues that because the intake worker testified that she had looked at and used police reports as part of the process of making a waiver recommendation, "the reports became part of her social records and should be discoverable by the defense." The intake worker, Debra Springer, however, indicated that she considered the seriousness of the offense as the most important concern, and also relied upon the fact that Derek will reach the age of majority on October 14, 1995. She

indicated Derek had been involved in a prior sexual assault and disorderly conduct. A "needs assessment" relating to the sexual assault matter was introduced into evidence as an exhibit at the waiver hearing. She described some failures on Derek's part to comply with certain requirements of an agreed upon school program. She expressed an opinion and gave reasons why she believed the juvenile system was inadequate for Derek under the circumstances, including his association in gang activity. She indicated that prior to her testimony she had reviewed only the notes that she had with her at the hearing, and that her notes were not taken from the police reports she had reviewed earlier. Under these circumstances, this court concludes that no constitutional due process violation occurred by denying access to the police reports until a later date.

Derek makes a brief challenge to the sufficiency of the evidence to sustain a waiver. The juvenile court emphasized the seriousness of the offense, considered Derek's past behavior and his character, as well as the recommendation of the intake worker. It concluded that Derek's past behavior was perhaps the best indicator of future behavior, and that Derek resisted numerous attempts to help in the past. It concluded that the time available in the juvenile system was inadequate to meet Derek's needs, in light of his emotional and educational disabilities. It considered the need to protect the public in this respect. It found prosecutive merit to the charges. The juvenile court has discretion as to the weight given each factor set forth in § 48.18(5), STATS. *In re D.H.*, 76 Wis.2d 286, 302-03, 251 N.W.2d 196, 205 (1977). The court did not erroneously exercise its discretion by ordering a waiver to adult court.

Although the court did not expressly find that the evidence was clear and convincing to support a waiver, this court will generally not review an issue raised for the first time on appeal. *Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). Further, this court may affirm in a case where the trial court reaches a result the evidence would sustain had a specific finding supporting that result been made. *Moonen v. Moonen*, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968). The evidence supports the decision by the necessary burden in this case.

By the Court. – Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

AN EXHIBIT HAS BEEN ATTACHED TO THIS
OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE
COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

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